



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
-----------------	-------------	----------------------	---------------------	------------------

10/620,038

07/15/2003

Justin Shimek

6126US

7511

30173 7590 01/14/2008
GENERAL MILLS, INC.
P.O. BOX 1113
MINNEAPOLIS, MN 55440

EXAMINER

MAHAFKEY, KELLY J

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

01/14/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/620,038	Applicant(s) SHIMEK ET AL.	
	Examiner Kelly Mahafkey	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 24 October 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,3-27,29-39 and 81 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,3-27,29-39 and 81 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Amendments made 10/24/07 have been entered.
Claims 1, 3-27, 29-39, and 81 remain pending.

Claim Rejections - 35 USC § 112

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

The 112 rejection of claims 9, 21, 22, 24 and 27 have been withdrawn based on applicant's amendments made October 24, 2007. The following 112 rejections remain:

Claims 30 and 31 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 30 recites, "the food product of claim 29", however, claim 29 refers to claim 22, which refers to claim 20, and there are two "products" recited in claim 20, both a "dried soft aerated food product" and a "composite food product". Thus it is unclear as to which "product" the limitations of claim 30 refer.

Claim 31 recites, "the food product of claim 30", however, claim 30 refers to claim 29, claim 29 refers to claim 22, claim 22 refers to claim 20, and there are two "products" recited in claim 20, both a "dried soft aerated food product" and a "composite food product". Thus it is unclear as to which "product" the limitations of claim 30 refer.

Claim Rejections - 35 USC § 102

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

The 102(b) rejection of claims 1, 3-9, 14, 15, 32, and 81 as anticipated by Peterson (US 3620769) has been withdrawn in light of applicant's arguments regarding the percentage of moisture as taught by Paterson (Remarks Pages 7-8).

Claims 1, 3-9, 14-17, 32, 38, and 81 are rejected under 35 U.S.C. 102(e) as anticipated by Roy et al (US 2004/0109933). The references and rejection are incorporated herein and as cited in the office action mailed April 24, 2007. Specifically

regarding the newly added limitation of claim 9, that the majority of the saccharide component is sucrose, in Example 1, Roy teaches of an aerated confection comprising about 79% saccharide component, including about 59% sucrose (a majority sucrose), about 11% corn syrup, and about 9% dextrose.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 10-13, 19, 20, 22, 24, 27-31, and 36 are rejected under 35 U.S.C. 103(a) as being unpatentable over Roy (US 2004/0109933), in view of Zietlow (US 6309686 B1). The references and rejection are incorporated herein and as cited in the office action mailed April 24, 2007.

Claims 16-18, 21, 23, 25, 26, and 33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Roy (US 2004/0109933), in view of Zietlow (US 6207216 B1). The references and rejection are incorporated herein and as cited in the office action mailed April 24, 2007. Specifically regarding the newly added limitations of claims 16 and 17, requiring a nutritionally fortifying ingredient including a mineral and/or an ethical drug, Roy teaches of aerated confections with additional textures, tastes, flavors, and an enhanced nutritional composition, including marbits as discussed above. Roy, however, is silent to the marbits as including a nutritionally fortifying ingredient, including a mineral as recited in claim 16, and an ethical drug as recited in claim 17. Zietlow teaches that marbits can be nutritionally enhanced with ethical drugs and 0.15-15% calcium (Column 4 lines 43-67 and Column 7 lines 58-61). Specifically regarding the marbit as taught by Roy as including a mineral and an ethical drug, Zietlow teaches that an aerated confection or marbit can be nutritionally enhanced with the addition of calcium and that marbits can carry ethical drugs for delivery purpose of the specific ethical drug. It would have been obvious to one of ordinary skill in the art at the time the invention was made to include nutritional fortifying ingredients, including minerals and

ethical drugs, in the marbit composition as taught by Roy in order to further enhance the nutrition of the confection.

Claims 34 and 35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Roy (US 2004/0109933), in view of Zietlow (US 6207216 B1), further in view of Igoe (Dictionary of Food Ingredients, 4th Edition). The references and rejection are incorporated herein and as cited in the office action mailed April 24, 2007.

Claims 37 and 39 are rejected under 35 U.S.C. 103(a) as being unpatentable over Roy (US 2004/0109933), in view of Zietlow (US 6207216 B1) and Igoe (Dictionary of Food Ingredients, 4th Edition), further in view of Gajewski (US 4251561). The references and rejection are incorporated herein and as cited in the office action mailed April 24, 2007.

Response to Arguments

Applicant's arguments, filed October 24, 2007, with respect to the 102(b) rejection over Peterson have been fully considered and are persuasive. Thus, as stayed above, the rejection has been withdrawn.

Applicant's arguments filed October 24, 2007 regarding the rejections of Roy and the combinations with Roy have been fully considered but they are not persuasive.

Applicant argues that the references of record, specifically Roy does not teach of a marbit with the same glass transition temperature and spring back factor as instantly claimed. Applicant's argument is not convincing as Roy teaches of a similar confection with the instantly claimed softening agent within the instantly claimed range, it would be expected that Roy inherently teaches of a product that has a glass transition temperature and spring back factor as instantly claimed. Applicant is reminded that where the claimed and prior art products are substantially identical in structure or composition, a prima facie case of either anticipation or obviousness has been established. In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433 (CCPA 1977). "When the PTO shows a sound basis for believing that the products of the applicant and the prior art are the same, the applicant has the burden of showing that they are not." In

re Spada, 911F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990). Applicant has chosen to use an equation with parameters and/or calculations that cannot be measured by the Office, for the purpose of prior art comparison, because the office is not equipped to manufacture prior art products and compare them for patentability. Therefore, as a prima facie case of obviousness has been properly established, the burden is shifted to the applicant to show that the prior art product is different.

In response to applicant's argument that Zietlow teaches away from the invention by teaching a crisp marshmallow, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981). Thus, applicant's argument is not convincing.

In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, applicant argues that there is no motivation to combine the teachings of Igoe with the teachings of Roy in view of Zietlow. Applicant's arguments are not convincing as Igoe teaches of benefits of including high intensity sweeteners in the place of sugar, thus providing proper motivation for substituting sugar with a high intensity sweetener.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Mahafkey whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Lien Tran/
Primary Examiner
Group 1700

Kelly Mahafkey
Examiner
Art Unit 1794

A handwritten signature in black ink, appearing to be 'K. Mahafkey', with a large, stylized loop at the end.